

BEFORE ARBITRATOR Kenneth T. GOYA

STATE OF HAWAII

In the Matter of the Arbitration between,)	Grievance of
)	(Suspension)
UNITED PUBLIC WORKERS,)	
AFSCME, LOCAL 626, AFL-CIO,)	
.....)	
UNIT 1)	
)	
Union,)	
)	
and)	
)	
STATE OF HAWAII, DEPARTMENT OF)	
TRANSPORTATION,)	
)	
Employer.)	

96-0220[56816V1]

ARBITRATOR'S DECISION

BACKGROUND OF THE GRIEVANCE

This pertains to a grievance filed by the United Public Workers, AFSCME, Local 646, AFL-CIO (Union) on behalf of (Grievant), seeking to reverse a three day suspension and to be able to use sick leave in lieu of 15.5 hours of unauthorized leave assessed by her employer, State of Hawaii, Department of Transportation, Airports Operations (Employer). Arbitration hearings were held on February 6, 1997 and March 31, 1997. The Employer was represented by Deputy Attorney General James E. Halvorson and Grievant was presented by David Hagino. The parties stipulated the Arbitrator has jurisdiction over this grievance.

This grievance by the Union is based on Sections 11.01, 37.05 and 37.09 of the Unit 1, Local 646, Collective Bargaining Agreement (Agreement).

ISSUES

I. Whether Grievant was suspended for just and proper cause. If not, what is the appropriate remedy.

2. Did Employer violate the Agreement by failing to allow Grievant sick leave. If so, what is the appropriate remedy.

SUMMARY OF THE FACTS

At all times pertinent to this grievance, Grievant was employed by Employer as a Janitor II. The janitors work on three shifts at the airport; the first starting at 6:00 a.m. (A), the second at 2:00 p.m. (B), and the third at 10:00 p.m. (C). At the beginning of each shift a meeting is held to determine work area assignments for the janitors. A color code assignment procedure was the method used by the working supervisors in assigning janitors to their duty stations for the period of 1985-1995. In 1995 a task force was created because of workers' complaints of favoritism relative to the way janitors were chosen to work on a certain shift. The task force came up with a new method of selection, using popsicle sticks with the workers' names on it, randomly picked by the janitor supervisors. However, at the request of the Union, the Employer issued a memorandum on, ordering the shifts to stop using the popsicle method of selection. A and B Shifts went back to the former color coding method of selection. However, C Shift, the graveyard crew, did not change its system but continued with a form of the same method, using cards instead of popsicle sticks.

On, at the briefing meeting held at the beginning of the graveyard shift, the working supervisors began to assign duty stations to the janitors using color coding. Grievant, a Janitor II and Union Shop Steward, saw this happening and questioned the supervisors about using the color code method of assigning workers. She questioned why C Shift's practice of using the cards was not being used. Grievant disrupted the briefing meeting by using profane and abusive language towards supervisor,, and a co-worker,, Grievant then announced, in a voice loud enough for everyone in the room to hear, something to the effect, "I'm sick, I'm going home. Anybody wants to go home, can go home sick too. You folks put me in this position to fight for you."

Grievant contends she became stressed because the working supervisors were using the color code procedure instead of the card assignment procedure. Grievant, looking directly at her two supervisors, and, announced that she was sick and was going home. Neither supervisor objected to Grievant leaving. Both supervisors deny being addressed directly by Grievant but admit they heard her. After Grievant made the announcement, she left the work site at approximately 10:35 p.m. along with other janitors,, and

Grievant went to her car and cried for about 45 minutes. She then went home and about 1:04 a.m. on, she called her work and spoke with, Janitor Supervisor. She informed him that she would out on sick leave for two days because of stress. As a result of the call,, prepared an Absence

Report, but the report only references one day of absence, Despite her representation that she told supervisor she would be out on sick leave for two days, Grievant's call for being ill was for the shift starting on According to the Employers records, Grievant did not report to work for the shift starting on, and did not call into her supervisor to report her absence, Grievant's normal days off were and She returned to work on

Employer contends Grievant's actions on the evening of, upset and frustrated her co-workers and disrupted the supervisors' briefing session. Grievant had used abusive and profane language during the briefing session and left the work premises without proper authorization from the on-duty airport relief manager. She further encouraged other employees to declare sick leave that evening and walk off the job.

In view of the above, Grievant was charged with 7.5 hours of unauthorized leave for leaving her assigned work station on without authorization, 8.0 hours of unauthorized leave for failing to report to work on, a one day suspension for leaving the job site without authorization in violation of the Handbook for Custodians, revised October 1, 1991 (Handbook), a one day suspension for using profane language and verbally attacking a supervisor and co-worker In violation of the Handbook, and a one day suspension for instigating a sick-out in violation of Section 10.1 of the Agreement. Grievant was not allowed to use her sick leave for the two days of absence.

For walking off the job without authorization that same evening,,, and, each received a letter of reprimand, with no suspension, and charged 7.5 hours of unauthorized leave. was absent two days, but was only assessed 7.5 hours leave. Apparently, she was allowed 1 day authorized sick leave for her second day of absence.

As a result of the instant grievance,, business agent for the Union, discovered the Employer had been using the Handbook for disciplinary purposes. The Employer had cited certain provisions of the Handbook as grounds for disciplining Grievant. As a result, the Union filed a grievance alleging, among other things, that the Handbook, revised on November 1, 1995, had not been properly negotiated and consented to pursuant to Section 1.05 of the Agreement. That grievance is the subject of another action, unrelated to this case. Further a Departmental Staff Manual was discontinued at the request of the Union and with the concurrence of of the Department of Transportation Personnel Department.

The parties have stipulated the Departmental Staff Manual and the 1995 Handbook has no application to the instant grievance.

....., Personnel Manager Specialist V, Division, Department of Transportation and UPW State Director testified on March 31, 1997. testified he had discussed proposed revisions to the 1987 Handbook with, Business Agent for the UPW at that time. These discussions took place after a grievance was filed by the Union regarding the

Handbook. Numerous exhibits were submitted by the Employer relative to the discussions between and Employer contends these discussions constitute the Union's mutual consent for use of the Handbook as required by section 1.05. Employer further points out that a meeting was held on May 18, 1989, with,, and other interested parties. The meeting was construed to be a settlement of the grievance. It was decided a mutual agreement would be secured between the parties at the time the Handbook was amended. The 1987 handbook was revised on October 1, 1991.

Gary Rodrigues testified that he has never delegated to anyone the authorization to consent to a Section 1.05 issue. He indicated the business agent had no authority to communicate any decision on behalf of UPW. All matters concerning Section 1.05 would have to be reviewed and signed by him personally. Mr. Rodrigues testified that he has never consented or agreed to use of a custodial handbook, specifically the one revised in October 1991. It was Mr. Rodrigues' understanding that as a result of a grievance filed by the Union on the Employer's use of the Handbook, the Employer agreed the Handbook would be withdrawn. He had assumed that no further Handbooks would be used. As to actions, Mr. Rodrigues testified that "she had no authority whatsoever" and if she participated in any negotiations, she did so on her own. eventually resigned from the UPW.

PERTINENT PROVISIONS

A. COLLECTIVE BARGAINING AGREEMENT

Section 10.1. The Union agrees that during the life of this Agreement the Union, its agents, or its bargaining union members will not authorize, instigate, aid or engage in any

work stoppage, slowdown, sick-out, refusal to work, picketing or strike against the Employer.

Section 37.05. Notification of absence on account of sickness shall be given as soon as possible on the first day of absence or if impracticable as soon thereafter as circumstances permit. If such notification has not be given in accordance with this section, such absence may, in the discretion of the department head, be charged to vacation allowance or leave without pay.

Section 37.09. Upon application by the employee, sick leave when granted may include all sick leave credits or as much thereof as is needed, to permit the employee to recover from his sickness.

B. HANDBOOK FOR CUSTODIANS

1. j. Employees will observe proper conduct and behavior when dealing in any supervisor-subordinate relationship, with peers, airport-users, tenants or members of the general public.

1) Profanity or abusive language will not be used by any employee or supervisor.

2) Fighting or arguments will not be tolerated at any time or location on the airport premises during working hours. This includes both on or off duty employees.

1. k. Employees are to remain in their assigned work areas at all times.

1) No one is to leave an assigned work station without prior approval or authorization. Custodial employees shall obtain clearance and approval from their working foreman; working foremen from their janitor's supervisors; janitors supervisors from the janitor superintendent or the duty Airport Services Supervisor; and the janitor superintendent from the Airport Operations Manager.

2) All employees are to report directly to their assigned work areas when beginning or resuming

work, and directly from their work station area to the central custodial station at the end of the work day.

3) Employees coming on or going off shift will report directly to the central custodial briefing room, and not congregate in restrooms, waiting lobbies or other public areas of the airport terminal while awaiting shift changes.

FINDINGS

A. Three alleged violations. For the most part, Arbitrator concurs with the basic contentions of the Employer as summarized below.

1. *Instigating a sick-out.* Grievant violated Section 10.01 of the Agreement by instigating or attempting to instigate a sick-out by verbally encouraging other workers to leave work due to illness. This is supported by the fact three other workers followed her by leaving work also. The testimonies of and others are credited in that Grievant was going to "sickout" because of the dispute over working assignment procedures.

2. *Using profane language towards a supervisor and co-worker.* Grievant violated Handbook Section 1.j. regarding use of profanity or abusive language. Grievant admits using profanity against her co-worker, However, she claims that was the extent of the swearing. testified Grievant had used a lot of profanity that evening. verified the same, although said Grievant did not swear at her.

3. *Leaving the job site without the supervisor's authorization.* Grievant violated Handbook Section 1.k.1) regarding leaving an assigned work station without authorization. Grievant was extremely stressed and upset when she observed the

janitor supervisors using the color coding system instead of the usual system involving cards. Arbitrator finds Grievant was "stressed" enough to justify her request to be allowed to go home from work due to illness. This is notwithstanding she had requested or encouraged others to also leave work. She left the job site without any objections from either of her supervisors, or

Testimony from and were elicited as to the airport custodial procedure for leaving the work site due to illness. The procedure, as stated by them, requires the employee to inform the working supervisor of his illness. The supervisor, in turn, contacts Code 22, the airport relief manager for the evening, in order to obtain authorization for the employee to leave work. Code 22 for that evening was This procedure was practiced and Grievant knew the procedures for leaving work. Arbitrator finds this procedure follows Handbook Section 1.k.1) regarding the need for an employee to obtain approval before leaving an assigned work station.

B. Lack of consent over the Employer's use of the Handbook as required by Section 1.05 of the Agreement.

As pertaining to this grievance, learned the Handbook had been used by the Employer for disciplinary purposes. She learned the 1991 Handbook had been revised on November 1, 1995. She checked the UPW files and discovered the Employer had not negotiated use of any Handbook with the Union pursuant to Section 1.05 of the Agreement. filed a grievance over use of the 1995 Handbook. The 1995 revision to the Handbook is the subject of a separate grievance of which the arbitrator has no knowledge of the outcome. requested,

Airport Operation Manager, to refrain from using the 1995 Handbook for disciplinary purposes until concurrence was received by the Union pursuant to Section 1.05.

Section 1.05 states as follows.

The Employer agrees that it shall consult the Union when formulating and implementing personnel policies, practices and any manner affecting working conditions. No changes in the wages, hours or other conditions of work contained herein may be made except by mutual consent.

As discussed above, testified a grievance on the Employer's use of the 1980's Handbook was resolved by the Employer agreeing to withdraw the Handbook. Considering this withdrawal Mr. Rodrigues had assumed no handbook was to be used. His testimony is credited.

Q. (by Mr. Hagino) Now one of the disputes involve a custodial handbook. Has the Union ever - - strike that. As the director of the Union, have you ever consented to or agreed to a custodial handbook which was revised November of 1991?

A. (By Mr. Rodrigues) With the airport?

Q. With the airports, yes.

A. Never. We had a -- initially the handbook came to our attention in the 1980's. We filed a grievance. We resolved the grievance by agreement that the handbook would be withdrawn.

Q. Okay. Now let me backtrack a little bit. The 1991 revised custodial handbook, the apparent revision date is November 1991. The Union has never consented to that handbook?

A. The Union did not. I reviewed my files specifically for this arbitration. There is not even a letter to me notifying me that there was such a handbook in effect.

Q. Okay. And there's no letter in your files from you agreeing, consenting to that handbook?

A. None whatsoever. (Pgs. 278-79 of transcript)

OnJuly 20, 1989, this Arbitrator issued a Decision on a grievance filed by against the State of Hawaii, Department of Transportation, Airport Division. Among other things, Arbitrator held that the employer had violated Section 1.05 of the Collective Bargaining Agreement by using an administrative memorandum for disciplinary purposes. In his decision, Arbitrator relied on a March 21, 1995, letter written by Alfred C. Lardizabal, Director of the Department of Transportation, State of Hawaii. This document was entered into evidence as Union Exhibit 4 to this grievance.

In his written response, Director Lardizabal addressed a class grievance filed by the Union regarding use of a 1982 memorandum written by, acting manager of the Honolulu International Airport. memorandum required custodial employees who were unable to work, to call their supervisor at least 30 minutes before their scheduled start time. The thrust of the Union's grievance was that this memorandum violated Section 1.05 of the Agreement, In his March 21, 1995 response Director Lardizabal recognized and discussed several key items, as paraphrased below.

There was a lack of mutual agreement (between the union and the employer) as contemplated in Section 1.05, namely, it was not agreed to by the State Director (Gary Rodrigues) and he had not delegated such authority. (p.1)

Section 1.05 has been construed to require negotiations to the point of mutual agreement. Absent any written documentation that there was in fact negotiations with and mutual consent by the State Director "whom the union claims is the only one authorized to do so", the (memorandum) must be rescinded. (P.3), emphasis added.

As a result of Director Lardizabal's indication that Section 1.05 consent had not been obtained as to the requirement a custodial worker call in at least 30 minutes before his scheduled work shift, the Arbitrator held that the memorandum was null and void and could not be used as a basis for discipline.

Gary Rodrigues testified that he has never delegated the authority to anyone else to negotiate a Section 1.05 issue. Specifically, the business agent has no authority to communicate any decision on behalf of UPW. All agreements and negotiations concerning Section 1.05 issues would have to be signed by him personally. had "no authority whatsoever" to negotiate 1.05 issues and did so on her own. Mr. Rodrigues testified that he has never consented to or agreed to a custodial handbook for the airport as he thought the one developed in the 1980's had been withdrawn from use. This would pertain to any Handbook, and certainly the one revised in October 1991.

Director Lardizabal's 1989 response is very explicit and provides notice the Employer knew the State Director "is the only one authorized to do so" relative to negotiations and mutual consent as required under Section 1.05. The mutual consent should be documented in writing. This notwithstanding, the Employer negotiated use of the Handbook directly with, without the involvement of the State

Director. Director Lardizabal's memorandum further discussed that relative to obtaining "mutual agreement" the State Director did not delegate such authority. This is corroborated by Mr. Rodriguez' testimony that he did not delegate or authorize these negotiations to Arbitrator recognizes that additional exhibits were provided by the Employer under cover letter dated July 18, 1997, after the last hearing on this arbitration was held on March 31, 1997. However, while reflective of the discussions with, these exhibits do not detract from the requirement negotiations with the State Director should have been sought by the Employer on use of the Handbook. As such, Arbitrator finds the additional exhibits are inconsequential as the State Director was not consulted and his consent, reduced to writing, was not obtained.

Arbitrator recognizes that In the eyes of the Employer, was authorized to consent to the use of the Handbook for disciplinary purposes. It is recognized she met with and discussed proposed changes to the Handbook with and others relative to a grievance she filed on May 5, 1989. Based an these discussions, the grievance was settled with the Employees agreement that further meetings would be held to discuss the need for correction in areas such as sick leave notification, which may be in conflict with provisions of the Agreement.

The issue whether she had the apparent authority to negotiate with the Employer on Section 1.05 issues needs to be construed In favor of the Union. Apparent authority only exists to the extent it is reasonable for the Employer dealing with to believe she was authorized. Already on notice, the Employer

should have negotiated with Mr. Rodrigues directly, especially since a prior grievance was resolved with the Employer's acknowledgment that the State Director is the only one authorized to negotiate a Section 1.05 issue. Director Lardizabal's response was written on March 21, 1989, just six weeks before May 5, 1989 grievance.

Based on a review of the testimonies of witnesses from two hearings, the written statements of witnesses, and the various exhibits submitted by Grievant and Employer, Arbitrator finds the Employer had just cause to discipline Grievant. Arbitrator finds that Grievant had violated Section 10.01 of the Agreement by instigating a sick-out. However, Arbitrator takes into account the history behind the Handbook and Section 1.05 concerns in ruling the Handbook, as revised on October 1, 1991, was implemented without mutual consent by the Union. Employer improperly relied on certain provisions of the Handbook that was not to be used for disciplinary purposes without the Union's consultation and consent. Thus, while Arbitrator finds Grievant violated the Handbook provision regarding use of profanity and may have violated the provision regarding leaving the work site without authorization, the 1991 Handbook is null and void and without any force and effect as consent for its use for disciplinary purposes was not secured as required by Section 1.05 of the Agreement.

The 15.5 hours of unauthorized leave assessed Grievant for leaving the work site on and for failing to report to work on is modified only to the extent Grievant is allowed to use her sick leave. Insofar as the Handbook is inapplicable, Arbitrator does not determine here whether Grievant's

announcement to, and others of her illness was adequate based on custodial procedures, or whether their non-response is construed to be an acquiescence or permission she was allowed to leave work. Arbitrator finds while she did not call In sick for the second day (.....), under Section 37.05 of the Agreement, she is only required to call in as soon as possible. Her call at 1:04 a.m. that evening is the second notification to the Employer of her illness, and at a time Arbitrator does not find to be unreasonable. Further call-in's are not required but a doctor's certification of illness is needed if the employee misses more than five days from work. Grievant missed only two days from work.

More importantly, Arbitrator notes the other employees who left the job site that evening were given lesser penalties for their actions. The three other employees were assessed unauthorized leave for the first day. They were not suspended like the Grievant, possibly because she was the instigator of the sick-out. However, in the comparable situation involving, she was allowed to use sick leave for her second day of absence. Grievant was assessed unauthorized leave for the second day of absence.

AWARD

NOW THEREFORE, IT IS HEREBY ADJUDICATED AND ORDERED

THAT:

1. For violation of Section 10.01 of the Agreement as Grievant had instigated a sick-out, the one day suspension is affirmed.

2. Insofar as the 1991 Handbook cannot be used for disciplinary purposes, the one day suspension imposed for using profane language towards her supervisor and co-worker is reversed. Grievant shall be reinstated one day, with pay.

3. Insofar as the 1991 Handbook cannot be used for disciplinary purposes, the one day suspension imposed for leaving work without authorization is reversed. Grievant shall be reinstated one day, with pay.

4. Grievant shall be allowed to use her sick leave for missing work due to sickness for the work day starting, instead of being assessed 7.5 hours unauthorized leave.

5. Grievant shall be allowed to use her sick leave for missing work due to sickness for the work day starting, instead of being assessed 8.0 hours unauthorized leave.

Arbitrator shall maintain jurisdiction over this grievance for 30 days.in the event there are any questions regarding this matter.

DATED: Honolulu, Hawaii, January 2, 1998.

KENNETH T. GOYA
Arbitrator

Subscribed and sworn to before me
this 2nd day of January, 1 998.

Notary Public, State of Hawaii
My commission expires:_____